

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

THE NORWOOD COMPANY : CIVIL ACTION
v. :
RLI INSURANCE COMPANY, et al. : NO. 01-6153

MEMORANDUM

Baylson, J.

February 2, 2005

Presently before the Court is a Motion to Enforce Settlement (Docket No. 58) filed by Defendant RLI Insurance Company (“RLI”) and joined in by other parties, including Plaintiff The Norwood Company (“Norwood”). The history of this case relates to a construction project in King of Prussia, Pennsylvania, and is not in dispute, but is relevant to the issue before the Court only as background. This case, a suit on performance and payment bonds, relates to another litigation in the Circuit Court of Chilton County, Alabama, which was arbitrated before the American Arbitration Association, and an award dated January 5, 2004 in which the arbitrators denied Bennett Composites, Inc.’s (“Bennett Composites”) claims against Norwood and awarded Norwood the sum of \$1,124,085.08 against Bennett Composites, in connection with a construction project in King of Prussia, Pennsylvania. This Court, by Memorandum and Order dated August 24, 2004, under caption Norwood Corp. v. Bennett Composites, Inc., C.A. No. 04-379 and The Norwood Company v. Bennett Composites, Inc., Miscellaneous No. 04-46, entered judgment on the award in favor of Norwood and against Bennett Composites. Thereafter, Norwood transferred this Court’s judgment to the Alabama court, which entered judgment in

favor of Norwood and against Bennett Composites.

Pursuant to the agreement of all parties, Senior Judge Reed of this Court held a mediation on December 14 and 15, 2004, including Norwood, RLI, Bennett Composites, two other parties in the Alabama litigation, Cathers & Associates, GFRC Cladding Systems, Inc., and also four individuals who are known in this case as “Indemnitors” (Gary Bennett and Kay Bennett, husband and wife; Charles Stephens and Floy Stephens, husband and wife).¹

Bennett Composites is an Alabama corporation, and Gary Bennett and Charles Stephens are its shareholders. There is a dispute between Gary Bennett and Charles Stephens as to who is in control, and/or ownership of exactly what percentage of shares, of Bennett Composites. In this Court, Bennett Composites has been and is represented by Edward P. Meyerson, Esquire of the firm Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., located in Birmingham, Alabama.²

The mediation before Judge Reed proceeded without any initial disputes. RLI has established that on December 15, 2004, in the afternoon, the lawyers appearing before Judge Reed, with Judge Reed’s knowledge, prepared a handwritten “agreement in principle” (Exhibit A to Motion). Some of the terms in Exhibit A were worked out and agreed to after some of the lawyers and principals had left Judge Reed’s chambers. RLI asserts a binding agreement was reached because all of the essential terms had been agreed to, either while all lawyers and/or their

¹In consideration of RLI’s issuance of the constructions bonds, the Indemnitors issued a General Agreement of Indemnity whereby they agreed to indemnify and hold RLI harmless from any losses, costs or expenses associated with issuing the subject bonds.

²This firm filed a Motion to Withdraw in Miscellaneous No. 02-46, but inasmuch as Bennett Composites is a corporation and must be represented by counsel, and no reason having been presented as to why Baker, Donelson must withdraw, and no other attorney having stepped forward to take the place of the Baker, Donelson firm in its representation of Bennett Composites, the Court must deny the Motion to Withdraw.

principals were in front of Judge Reed, or in follow-up telephone conversations as to certain changes that were made after some of the attorneys and parties had left Judge Reed's chambers.

The Motion to Enforce the Settlement is supported by all parties who were represented by counsel participating in the mediation before Judge Reed, except for two of the Indemnitors, Gary Bennett and his wife Kay Bennett, who oppose it.

Initially, this Court held an on-the-record phone conference on January 14, 2005 to determine how the Court would proceed on the Motion to Enforce Settlement; Mr. Bennett participated in the phone conference pro se. Thereafter, a hearing was held without objection in Court on January 19, 2005, at which time the Court received testimony from various individuals including Gary Bennett, still appearing pro se. The following are the Court's findings.

Mr. Bennett testified to his belief that Meyerson had no authority to represent Bennett Composites. As explained to Mr. Bennett at the hearing, under the rules of Court, Bennett Composites, as a corporate party, had to be represented by counsel, and as long as Mr. Meyerson's appearance was entered, the Court will respect Mr. Meyerson as the corporate counsel.³

Mr. Bennett further testified that at the mediation before Judge Reed, Mr. Meyerson did not have any authority to represent him and that he specifically excepted to certain terms of the settlement. Mr. Bennett asserts he fired Meyerson as his own personal attorney before any settlement was reached, and therefore Meyerson had no authority to bind him to a settlement. Mr. Bennett's testimony was disputed not only by Mr. Meyerson, but by all other individuals

³Of course, this does not impact on Mr. Bennett's ability to seek a ruling from a court of competent jurisdiction as to who controls Bennett Composites and whether Mr. Meyerson had authority to represent that corporation. That issue is not before this Court.

who were present. Several of the witnesses, Messrs. Winship (of RLI), Polishuk and Brownette (of Norwood), Britt Monroe, Esquire, counsel for Cathers, and D. Mitchell Henry, Esquire, counsel for GFRC, had, at the suggestion of the Court, submitted Declarations but were available for cross examination by Mr. Bennett. Messrs. Winship, Polishuk and Brownette were present in the courtroom, and Messrs. Monroe and Henry were on the telephone and available for cross examination. However, Mr. Bennett declined the opportunity to cross examine any of them.

Mr. Meyerson specifically testified that he believed that he was authorized to represent Mr. Bennett throughout the mediation, was authorized to approve certain changes or additions to the settlement terms that were read to him during the telephone conference after he had left the mediation, and he did not believe that his authority to represent Mr. Bennett individually had ever been withdrawn. Several witnesses testified that Mr. Bennett, upon leaving the mediation, had stated that Mr. Stephens had authority to make decisions on behalf of Mr. Bennett individually. Mr. Stephens testified that he did not have any opinion as to whether Mr. Bennett had revoked Mr. Meyerson's authority to represent Mr. Bennett during the mediation. Although Mr. Stephens' testimony at the hearing was somewhat equivocal, he did not contradict the other witnesses who testified that Mr. Bennett had given Mr. Meyerson and Mr. Stephens authority.

Based on the Court's review of the testimony and the Court's evaluation of the credibility of the various witnesses, the Court finds that Mr. Meyerson was authorized to represent Mr. Bennett and his wife Kay Bennett at all relevant times and that the settlement which Mr. Meyerson reached is binding on Mr. Bennett and Kay Bennett. The Court specifically finds that Mr. Bennett, before leaving the mediation and in response to questions from other parties, met with Mr. Stephens and Mr. Meyerson and then advised the other parties and their counsel present

that Mr. Stephens would have full authority on behalf of Bennett Composites and the Indemnitors, even though he, Mr. Bennett, was leaving. (Winship Decl. ¶¶ 22-27). Shortly thereafter, Mr. Meyerson reached agreement on certain essential terms on behalf of his clients, including Bennett Composites and all the indemnitors. Then, Mr. Meyerson and Mr. Stephens left the mediation but certain changes, which were made after they left, were communicated to them by telephone when they were at the Philadelphia Airport. The Court finds that these changes were either within the authority of Mr. Meyerson on behalf of all of his clients, including Bennett Composites and the indemnitors, or within the authority of Mr. Stephens to bind Mr. Bennett, or both, and that by Mr. Stephens and/or Mr. Meyerson agreeing to the changes proposed while Mr. Meyerson was on the telephone at the airport, Mr. Bennett is bound to all settlement terms, which are incorporated into the proposed settlement agreement. (Exhibit B to Motion).

Subsequent to the hearing, the Court received an Affidavit from Mrs. Kay Bennett, but because she did not appear at the January 19, 2005 hearing and her Declaration is not subject to cross examination, the Court cannot consider her Declaration. The Court finds that Mr. Meyerson was authorized to and did represent Kay Bennett and all actions which he took as counsel for the Indemnitors are binding on Kay Bennett. Also subsequent to the hearing, the Court received a Memorandum from Mr. Bennett which contains both testimony and argument. However, the facts stated are merely in further detail of Mr. Bennett's testimony and argument that he had revoked Mr. Meyerson's authority, which the Court rejects as not credible in light of the testimony of Mr. Meyerson and the other parties to the mediation, and because Mr. Bennett may have great personal gain from disavowing the settlement.

The Court also credits the Declarations submitted by Messrs. Winship, Polishuk, Brownette, Monroe and Henry. They are consistent with each other and with Mr. Meyerson's testimony.

The Third Circuit has held that "an agreement to settle a lawsuit, voluntarily entered into, is binding upon the parties, whether or not made in the presence of the court, or even in the absence of a writing." Green v. John H. Lewis & Co., 436 F. 2d 389, 390 (3d Cir. 1970). Since the Court has found that the attorneys who came to the agreement were fully authorized to represent their clients and to negotiate on their behalf and that they have unconditionally testified that the agreement which was reached was within the authority granted to them by their clients, this Court has the power to enforce the settlement. See Pug v. Super Fresh Food Markets Inc., 640 F. Supp. 1306 (E.D. Pa. 1986). The settlement agreement reached on December 15, 2004 is binding even though the parties intended to adopt a formal document with additional terms at a later date. See the opinion of Magistrate Judge Angel in Simulata, Inc. v. Clark O'Neill, Inc., 1996 U.S. Dist. LEXIS 18243 (E.D. Pa. 1996).

For the foregoing reasons, the Court will grant the Motion to Enforce the Settlement. The Court specifically notes that in the Notice of Dismissal of this case under Local Rule 41.1(b), the Court reserved jurisdiction for up to one year to enforce the terms of the settlement.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
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THE NORWOOD COMPANY : CIVIL ACTION
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ORDER

AND NOW, this 2nd day of February, 2005, upon RLI Insurance Company's Motion to Enforce Settlement (Docket No. 58), and any response thereto, it is hereby ORDERED that the Motion is GRANTED.

It is FURTHER ORDERED as follows:

1. On December 15, 2004, the Norwood Company, RLI Insurance Company, Bennett Composites, Inc. Cathers and Associates, David Schoenhard, GFRC Cladding Systems, Inc., Charles Stephens, Floy Stephens, Gary Bennett, and Kay Bennett, all represented by counsel, following two days of mediation before the Honorable Lowell A. Reed, Jr., reached a full and final settlement in connection with the above-captioned action, together with an action captioned, Bennett Composites, Inc. v. The Norwood Company, Cathers and Associates, GFRC Cladding Systems, Inc., Millennium Metal Works, Inc., and David Schoenhard, an Individual, docketed at Civil Action No. 2001-426, pending in the Circuit Court of Chilton County, Alabama.

2. At the conclusion of the mediation, the parties specified the points of their settlement in a written Agreement in Principle, which was prepared and agreed to in the presence of Judge Reed.

3. Shortly thereafter, as agreed, the parties circulated a draft formal Settlement Agreement, with the contribution, comments and agreement of counsel for all parties.

4. Subsequently, Gary Bennett, on behalf of himself, Kay Bennett and purportedly on behalf of Bennett Composites, Inc., refused to execute the Settlement Agreement, repudiated the settlement reached at the conclusion of the mediation, and also terminated Edward Meyerson, Esquire of the firm Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. as their counsel.

5. The parties did reach a full and final settlement at the conclusion of the mediation on those issues referenced in the draft settlement agreement attached to the Motion to Enforce Settlement, with all of the terms of that settlement embodied therein.

6. The Court finds that Edward Meyerson, Esquire of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. remains as counsel for Bennett Composites, Inc. and is authorized to execute the Settlement Agreement on its behalf.

7. Within ten (10) days of the date of this Order, all parties to the mediation shall execute the Settlement Agreement. The parties shall proceed to perform all obligations specified within the Settlement Agreement. All parties shall further cooperate and promptly execute all further documents necessary to effectuate the terms of the Settlement Agreement. Additionally, counsel for Bennett Composites, Inc. shall execute and deliver to counsel for Norwood a stipulation to dismiss the Chilton County action.

8. In the event that any party fails to execute the Settlement Agreement within the ten (10) days provided for in this Order, the Settlement Agreement shall be deemed fully executed, and enforceable as a matter of law. Furthermore, upon payment of the settlement amounts set forth in the Settlement Agreement, all releases set forth therein shall be deemed in

effect, as a matter of law. Within twenty (20) days, all parties shall be obligated to take all actions required in the Settlement Agreement, including but not limited to, dismissing the Chilton County action with prejudice, or shall be subject to sanctions, or such other further legal or equitable remedy the Court deems appropriate upon application to the Court.

BY THE COURT:

s/Michael M. Baylson
Michael M. Baylson, U.S.D.J.

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